WH ELECTRICAL MARKETING (M) SDN BHD A

v.

JABATAN KERJA RAYA MALAYSIA & ORS

COURT OF APPEAL, PUTRAJAYA B
ZAINUN ALI JCA
RAMLY ALI JCA
JEFFREY TAN JCA
[CIVIL APPEAL NO: W-01(NCC)-367-2010]
6 SEPTEMBER 2010 C

CONTRACT: *Assignment - Deed of assignment - Whether a valid assignment - Goods sold and delivered - Claim for sum due and owing - Whether goods duly acknowledged, delivered and utilised - Whether appellant's claim should succeed - Malayawata Steel Berhad v. Government of Malaysia & Anor* D

CONTRACT: *Goods sold and delivered - Claim for payment - Whether goods duly acknowledged, delivered and utilised - Whether appellant's claim should succeed - Malayawata Steel Berhad v. Government of Malaysia & Anor* E

The appellant filed an action against the respondents for goods sold and delivered for the Politeknik Project in Muadzam Shah, Pahang ('the project'). The appellant's cause of action against the respondents was for the sum of RM4,917,705.70 based on a written deed of assignment (dated 27 June 2007) and 'The Consent of the Government of Malaysia to Deed of Assignment for Direct Payment to a Third Party' (dated 25 July 2007) for direct payments, which was the balance sum due and owing for goods sold and delivered for the said project together with interest and costs. After a full trial, the High Court judge dismissed the appellant's claim. The learned judge found that the appellant had not secured all the condition precedent which was essential and necessary from the subcontractor (RBA) for the first respondent to effect payment. The learned judge also ruled that pursuant to cl. 5 of the deed of assignment, the payment to the appellant (as the assignee) could not be made without the subcontractor's (RBA as the assignor) certification. Hence, the appellant appealed against the whole of the decision of the High Court judge. It was the contention of the appellant that (i) pursuant to the deed of F G H I

assignment (security for direct payment to third party) payments for the goods/materials sold and delivered for the said subcontract works was to be made by the first respondent to the appellant as the supplier; (ii) pursuant to 'The Consent of the Government of Malaysia to Deed of Assignment for Direct Payment to a Third Party' dated 25 July 2007, the first respondent had agreed to make direct payments to the appellant for the said goods sold and delivered to RBA for the subcontract works; (iii) the first respondent was bound by the said 'consent to pay' for the balance of the goods/materials supplied, sold and delivered by the appellant to RBA for the said works before the first respondent terminated the main contractor (Kausar) and RBA as the subcontractor for the project.

Held (allowing the appeal with costs)

Per Ramly Ali JCA delivering the judgment of the court:

(1) Under cl. 2 of the deed of assignment "the Assignor (RBA) absolutely assigns to the assignee (the appellant) moneys payable now or hereinafter due and payable to the Assignor (RBA) under the nominated subcontract, not exceeding the assigned sum." It was a valid absolute assignment. Pursuant to the written consent dated 25 July 2007 the first respondent had agreed and undertaken to make direct payments to the appellant for the goods/materials sold and delivered to RBA for the subcontract works. The payments made by the first respondent and RBA was insufficient to cover the price for all the goods/materials sold and delivered by the appellant for the project, thus leaving the balance of the amount claimed as due and owing. Relevant invoices and delivery orders had been tendered as evidence. There was no dispute by the respondents that all the said goods/materials were duly acknowledged, delivered and utilised for the said subcontract works. (paras 16, 17 & 19)

(2) There existed a written deed of assignment, wherein the appellant's only reason to supply the goods/materials to RBA was that they could secure direct payments from the government (the respondents). After the last progress payments there were no subsequent progress payments because RBA's contract was terminated and RBA had been wound up. Therefore no claim could be submitted by the appellant to RBA. Further, it was also not disputed that all the goods/materials had been duly delivered to the project site.

Therefore, based on the decision in *Malayawata*'s case, the appellant's claim should succeed on the balance due and owing for the goods/materials sold and delivered for the benefit of the respondents. (para 27)

Bahasa Malaysia *Translation Of Headnotes*

Perayu memfailkan suatu tindakan terhadap responden untuk barangan yang dijual dan dihantarserah untuk Projek Politeknik di Muadzam Shah, Pahang ('projek'). Kausa tindakan perayu terhadap responden-responden adalah untuk jumlah RM4,917,705.70 berdasarkan surat ikatan penyerahhakkan (bertarikh 27 Jun 2007) dan 'Dengan Persetujuan Kerajaan Malaysia untuk Surat Ikatan Penyerahhakkan bagi Bayaran Terus kepada Pihak Ketiga' (bertarikh 25 Julai 2007) bagi bayaran terus, iaitu baki jumlah yang terhutang untuk barangan yang dijual dan dihantarserah bagi projek tersebut bersama-sama dengan faedah dan kos. Selepas perbicaraan penuh, Hakim Mahkamah Tinggi menolak permohonan perayu. Hakim yang bijaksana mendapati bahawa perayu gagal memenuhi semua syarat-syarat duluan yang penting dan perlu dari subkontraktor (RBA) untuk responden pertama melaksanakan bayaran. Hakim yang bijaksana juga membuat perintah bahawa di bawah kl. 5 surat ikatan penyerahhakkan, bayaran kepada perayu (sebagai penerima serah hak) tidak boleh dilaksanakan tanpa pensijilan dari subkontraktor (RBA sebagai penyerah hak). Oleh itu, perayu merayu terhadap keseluruhan keputusan Hakim Mahkamah tinggi. Ia adalah hujahan perayu bahawa (i) di bawah Surat Ikatan Penyerahhakkan (Jaminan untuk Bayaran Terus kepada Pihak Ketiga) bayaran untuk barangan yang dijual dan dihantarserah untuk kerja-kerja subkontrak tersebut harus dibuat oleh responden pertama kepada perayu sebagai pembekal; (ii) di bawah 'Dengan Persetujuan Kerajaan Malaysia untuk Surat Ikatan Penyerahhakkan bagi Bayaran Terus kepada Pihak Ketiga' bertarikh 25 Julai 2007, responden pertama telah bersetuju untuk membuat bayaran terus kepada perayu untuk barangan yang dijual dan dihantarserah ke RBA untuk kerja-kerja subkontrak; (iii) responden pertama terikat dengan 'persetujuan untuk membayar' bagi baki barangan/bahan-bahan yang dibekalkan, dijual dan dihantar oleh perayu kepada RBA bagi kerja-kerja tersebut sebelum responden pertama menamatkan kontraktor utama (Kausar) dan RBA sebagai subkontraktor untuk projek.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Ramly Ali HMR menyampaikan penghakiman mahkamah:

(1) Di bawah kl. 2 Surat Ikatan Penyerahakkan "Penyerah Hak (RBA) menyerahhakkan sepenuhnya kepada Penerima Serah Hak (perayu) wang perlu dibayar sekarang atau seterusnya perlu dibayar kepada Penyerah Hak di bawah subkontraktor dinamakan, tidak melebihi jumlah yang diserahhakkan." Ia adalah perjanjian mutlak yang sah. Di bawah persetujuan bertulis bertarikh 25 Julai 2007 responden pertama telah bersetuju dan berjanji untuk membuat bayaran terus kepada perayu untuk barangan/bahan-bahan dijual dan dihantar kepada RBA untuk kerja-kerja subkontrak. Bayaran-bayaran yang dibuat oleh responden pertama dan RBA tidak cukup untuk meliputi harga bagi semua barangan/bahan-bahan dijual dan dihantar oleh perayu untuk projek, oleh itu meninggalkan baki jumlah yang dituntut sebagai perlu dibayar. Invois-invois relevan dan pesanan-pesanan penghantaran telah dikemukakan sebagai keterangan. Tidak terdapat pertikaian oleh responden-responden bahawa semua barangan/bahan-bahan tersebut telah diakui, dihantar dan digunakan untuk kerja-kerja subkontrak.

(2) Terdapat surat ikatan penyerahhakkan bertulis, di mana satu-satunya sebab perayu membekalkan barangan/bahan-bahan kepada RBA adalah supaya mereka dapat memperolehi bayaran terus dari kerajaan (responden-responden). Selepas bayaran kemajuan terakhir tidak terdapat bayaran kemajuan seterusnya kerana kontrak RBA telah ditamatkan dan RBA telah digulungkan. Oleh itu perayu tidak dapat membuat tuntutan terhadap RBA. Seterusnya, ia juga tidak dipertikaikan bahawa semua barangan/bahan-bahan telah dihantar kepada tapak projek. Oleh itu, berdasarkan keputusan kes *Malayawata*, tuntutan perayu sepatutnya dibenarkan untuk baki bayaran perlu dibayar untuk barangan/bahan-bahan dijual dan dihantar untuk manfaat responden-responden.

Case(s) referred to:
Malayawata Steel Berhad v. Government of Malaysia & Anor [1980] 1 LNS 45 PC ***(refd)***
William Brandt's Son & Co v. Dunlop Rubber Company, Limited [1905] AC 454 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 226(3)

For the appellant - Sng Eu Kim (Farida Mohammad with him); M/s Sng & Co
For the respondents - Sharifah Hascindie Syed Omar SFC; AG's Chambers

[Appeal from High Court, Kuala Lumpur; Suit No: D-21 NCC-1-2009]

Reported by Suhainah Wahiduddin

JUDGMENT

Ramly Ali JCA:

The Appeal

[1] This is an appeal by the appellant (the plaintiff in the court below), WH Electrical Marketing (M) Sdn Bhd against the whole of the decision of the learned High Court judge dated 21 May 2010 in dismissing the appellant's claim of RM4,917,705.70 against the respondents with cost of RM50,000 to be paid by the appellant to the respondents.

The Appellant's Claim

[2] The appellant filed an action against the respondent *vide* Guaman No. D-21 NCC-1-2009 for goods sold and delivered for the Politeknik Project in Muadzam Shah, Pahang. The appellant's cause of action against the respondents is for the sum of RM4,917,705.70 based on a written deed of assignment (dated 27 June 2007) and "The Consent of the Government of Malaysia to Deed of Assignment for Direct Payment to a Third Party" (dated 25 July 2007) for direct payments, which is the balance sum due and owing for goods sold and delivered for the said project together with interest and costs.

Brief Facts

[3] Pursuant to a contract dated 13 March 2006, the 1st respondent had appointed Kausar Corporation Sdn Bhd (Kausar) (as the main contractor) to build and complete the project. Kausar then appointed Syarikat Elektrik RBA Sdn Bhd (RBA) as the subcontractor for the "supply, installation, testing and commissioning of mechanical and electrical and IT services" for the project, with the consent of the 1st respondent.

[4] RBA then appointed the appellant to supply them materials for the subcontract works ie, electrical cables, electrical lights and electrical fittings.

[5] A Deed of Assignment (Security for Direct Payment to Third Party) dated 27 June 2007 was executed between RBA and the appellant and consented to by the main contractor (Kausar). Under the said deed of assignment, the main contractor (Kausar) and RBA had agreed for direct payments from the 1st respondent to the appellant as supplier of the materials for the subcontract works.

[6] The 1st respondent was duly notified of the arrangement under the said assignment by the appellant on 27 June 2007. At the same time, the appellant furnished the 1st respondent with the name and bank account number to facilitate the transaction.

[7] Subsequently, pursuant to "The Consent of the Government of Malaysia to Deed of Assignment for Direct Payments to a Third Party" dated 25 July 2007, the 1st respondent agreed to make direct payment to the appellant for the goods/materials sold and delivered to RBA for the said subcontract works.

[8] On or about, 28 June 2007, RBA issued a purchase order to the appellant requesting the appellant to supply the goods/materials for the subcontract works.

[9] On or about 24 April 2008, the 1st respondent terminated Kausar and RBA as the main contractor and subcontractor for the project, but the balance of the purchase price for the goods sold and delivered by the appellant for the subcontract works was still due and owing, as alleged by the appellant. The said balance is the subject matter of the appellant's claim against the respondents in the present suit.

[10] After full trial, the learned High Court judge dismissed the appellant's claim with costs in the sum of RM50,000 to be paid to the respondents. The learned judge found that the appellant had not secured all the condition precedent which are essential and necessary from the subcontractor (RBA) for the 1st respondent to effect payment. The learned judge also ruled that pursuant to cl. 5 of the deed of assignment, the payment to the appellant (as the assignee) could not be made without the subcontractor's (RBA as the assignor) certification.

Appellant's (Plaintiff) Contentions

[11] The appellant contends that pursuant to the Deed of Assignment (Security for Direct Payment to Third Party) payments for the goods/materials sold and delivered for the said subcontract works are to be made by the 1st respondent to the appellant as the supplier.

[12] In addition to that, the appellant further contends that pursuant to "The Consent of the Government of Malaysia to Deed of Assignment for Direct Payment to a Third Party" dated 25 July 2007, the 1st respondent had agreed to make direct payments to the appellant for the said goods sold and delivered to RBA for the subcontract works.

[13] In the premise, the appellant contends that the 1st respondent is bound by the said 'consent to pay' for the balance of the goods/materials supplied, sold and delivered by the appellant to RBA for the said works before the 1st respondent terminated the main contractor (Kausar) and RBA as the subcontractor for the project.

Respondent's (Defendant) Contentions

[14] The respondents contend *inter alia* that the appellant's claim on the balance price of the goods/materials sold and delivered to RBA for the subcontract works, if any, should be claimed from RBA itself; and since RBA had been wound up on 16 July 2009, the appellant should seek legal redress against RBA by either filing a proof of debt with the Insolvency Department or by obtaining leave of the winding up court under s. 226(3) of the Companies Act 1965 to initiate proceedings against RBA.

[15] The respondents further contend that pursuant to the deed of assignment, the appellant has failed to obtain prior certification of RBA on the claim and therefore no payment could be made by the 1st respondent to the appellant without such certification.

Findings Of Court

[16] Under cl. 2 of the deed of assignment "the Assignor (RBA) absolutely assigns to the assignee (the appellant) moneys payable now or hereinafter due and payable to the assignor (RBA) under the nominated subcontract, not exceeding the assigned sum". It is a valid absolute assignment.

[17] Pursuant to the written consent dated 25 July 2007 the 1st respondent had agreed and undertaken to make direct payments to the appellant for the goods/materials sold and delivered to RBA for the subcontract works. In fact, by cl. 2(d) of the said written consent the respondents themselves contemplate claim and legal action by the appellant against them pursuant to the deed of assignment. The appellant's claim in this case obviously does not exceed the assigned sum.

[18] There is evidence to show that the only reason why the appellant had agreed to supply the goods/materials to RBA for the said subcontract works was because there was direct payment undertaking from the respondents. With the written consent by the respondents, the appellant would definitely secures payments for the goods/materials in question.

[19] It is not in dispute that the payments made by the 1st respondent and RBA was insufficient to cover the price for all the goods/materials sold and delivered by the appellant for the project in question, thus leaving the balance of the amount claimed as due and owing. Relevant invoices and delivery orders have been tendered as evidence. All the said goods/materials were acknowledged received by the representatives of the main contractor, RBA as well as the representative of the 1st respondent (Ilham Consult Sdn Bhd). There is no dispute by the respondents that all the said goods/materials were duly acknowledged, delivered and utilised for the said subcontract works. PW1 (for the appellant) led evidence (which is not rebutted) that there was no complaint to the said goods in question and the amount stated in the invoices.

[20] It is unfortunate that the 1st respondent had terminated the main contractor and RBA (as sub contractor) on 24 April 2008, after the appellant had supplied and delivered all the goods/materials required to RBA for the said project, but before final payment being made on the balance (as claimed by the appellant in this suit) for those goods/materials delivered before the termination.

[21] It is further unfortunate that after the termination, RBA was wound-up by a third party.

[22] These two unfortunate incidents made it impossible for the appellant to secure certification of RBA in making its claim against the 1st respondent. Thus it is unjust for the 1st respondent to

refuse the appellant's claim just on the ground that the appellant had not obtained prior certification by RBA, whose contract with the 1st respondent had been terminated and its entity wound up by a third party, particularly in the case where delivery of the goods/materials for the benefit of the 1st respondent is not disputed.

[23] It is noted that during cross-examination of DW1 and DW2 (witnesses for the respondents) both of them agreed that if the contract were not terminated by the 1st respondent, everyone would get paid for the works done and goods supplied in full at the end of the project (see: pp. 95-97 of the appeal records). It must also be noted that in this case, the supply of the goods/materials in questions has been fully executed as all the said goods/materials have been delivered to the site and utilized for the subcontract works for the benefit of the 1st respondent and no complaint on those goods/materials in question. That being the case, the court is of the view that the termination of the contract on the main contractor and RBA on 24 April 2008 alone is insufficient ground for the 1st respondent to refuse payment for the goods/materials which had been supplied before the date of the termination, pursuant to the undertaking they had consented to in "The Consent of the Government of Malaysia to Deed of Assignment for Direct Payment to a Third Party" dated 25 July 2007.

[24] In the present case the appellant has the option of either to seek legal redress against RBA (which has been wound up) by filing a proof of debt with the insolvency department or to sue the respondents under the deed of assignment and "The Consent of the Government of Malaysia to Deed of Assignment for Direct Payment to a Third Party". The said consent does not stop or preclude the appellant from taking any action against the respondents. The said consent, *vide* cl. 2(d), compels RBA to indemnify the respondents if any action is taken by the appellant against the respondents due to the reason of the said deed of assignment. The respondents had clearly contemplated claims by the appellant against them by virtue of the said cl. 2(d) of the said consent.

[25] DW2 in his evidence had admitted that the 1st respondent had paid the main contractor and/or RBA for the sum claimed by the appellant in the present suit. This court is of the view that the 1st respondent should have paid the appellant due to the

existence of the deed of assignment and the consent by the respondents for direct payment. This amount should not be paid to the main contractor and/or RBA. The House of Lords in *William Brandt's Son & Co v. Dunlop Rubber Company, Limited* [1905] AC 454 had stated that "if they pay to the wrong person they still have to pay the money over again to the right person ie, the assignee".

[26] The Privy Council's decision in *Malayawata Steel Berhad v. Government of Malaysia & Anor* [1980] 1 LNS 45 is relevant to the present case. In that case the Privy Council allowed the appellant's (assignee's) claim against the Government of Malaysia based on a deed of assignment and the Government's consent to the said deed of assignment given earlier. It was also decided in that case that "PWD (the same entity with the 1st respondent in the present case) would be liable for the value of MSB steel actually brought on to the particular site and the burden was on MSB to prove that value".

[27] It is noted that in this present case, there exist a written deed of assignment, wherein the appellant's only reason to supply the goods/materials to RBA was that they can secure direct payments from the Government (the respondents). After the last progress payments there were no subsequent progress payment because RBA's contract was terminated and RBA has been wound up. Therefore no claim could be submitted by the appellant to RBA. Further, it is also not disputed that all the goods/materials have been duly delivered to the project site. Therefore, based on the decision of the Privy Council in *Malayawata*'s case, the appellant claim should succeed on the balance due and owing for the goods/materials sold and delivered for the benefit of the respondents.

Conclusion

[28] Based on the above considerations, this court unanimously allowed the appeal with costs of RM5,000 to the appellant. The deposit is to be refunded to the appellant.